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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. GREGORY ALEXANDER, Defendant and Appellant.	A152493 (Del Norte County Super. Ct. No. CRF169477)

Gregory Alexander appeals from a judgment based on a guilty plea convicting him of carjacking (Pen. Code, § 215) and two misdemeanors, finding true the allegations supporting two sentence enhancements, and imposing a prison sentence of 13 years 8 months. He contends that the trial court abused its discretion by failing either to grant his motion to withdraw his plea or to appoint substitute counsel to investigate and present that motion.

At the sentencing hearing, defendant's appointed counsel, Karen Olson, argued that she had been ineffective in failing to discover his out-of-state criminal record before advising him to accept a plea bargain with an open plea, instead of an alternative offer with a guaranteed midterm sentence. Defendant had told Olson that he had no prior prison terms or felonies. After his plea, however, she learned of his extensive criminal history in New Jersey—a history that would have led her to advise him to accept the midterm sentence. The trial court did not agree with Olson that she had been ineffective: "He knew he had the convictions[;] [y]ou didn't." Accordingly, "the bad advice [defendant

received] was based upon the information he provided." Defendant did not request, and the court did not address whether to appoint, substitute counsel.

We agree that Olson was not ineffective in failing to discover the falsity of the information she received from defendant himself, and we conclude that the court was not obliged to investigate sua sponte whether to appoint substitute counsel. We shall therefore affirm the judgment, while granting the parties' mutual request to order the correction of two clerical errors in the abstract of judgment.

Factual and Procedural Background

In December 2016, defendant was charged with 16 offenses after he carjacked a vehicle from an elderly man and his grandson and drove recklessly to try to escape police, twice driving at officers and forcing them to evade him. In January 2017, the prosecutor made a settlement offer, and the case was continued to permit defendant to consider it. In February 2017, he waived a preliminary hearing, and the People filed an information charging the 16 offenses and alleging vulnerable-victim sentencing enhancements (Pen. Code, § 667.9, subds. (a) & (c)(3), (4), (11)). Defendant pled not guilty, and the case was continued several times.

In August 2017, defendant accepted the plea offer, pled guilty to one count of carjacking (Pen. Code, § 215) and two counts of assault on a peace officer with a deadly weapon (Pen. Code, § 245, subd. (c)), and admitted the vulnerable-victim allegations. Under the plea, defendant's total potential sentence ranged from 7 years 8 months to 13 years 8 months, with a midterm of 9 years 8 months. Three weeks after he entered his plea, the presentence investigation report revealed that he had been convicted of 10 crimes in New Jersey, one of which had resulted in a five-year prison term.

At the sentencing hearing a week later, the court stated its tentative decision to sentence defendant to a term of 13 years 8 months based on factors including his criminal history and prior prison term. Defense counsel Olson then told the court that when she read the presentence investigation report, "the extent of his criminal history" came "as a complete surprise." Defendant had only one conviction in California, a misdemeanor, and she said that when she had spoken to him, "he indicated that he did not have any prior

prison terms or felonies." Olson added, "I assume now he meant in California," but she did not suggest that she had limited her inquiry to California convictions or prison terms, or identify any reason why defendant could have understood the question to be so limited.

Olson then described how the People had given defendant the choice of a stipulated midterm sentence or an open plea. She and defendant had "talked about it extensively," and she had believed that, with his apparently limited criminal history, she had a chance of successfully advocating a mitigated term, which led her to recommend that he choose the open plea. In so doing, Olson now argued, she had been ineffective: "Not knowing that he did have an extensive criminal history in New Jersey, I think I gave him bad advice. . . . [O]bviously had I known that he had . . . five prior felony convictions, [and] five years in prison, I would have advised him to [accept] a stipulated mid term [sentence] because the criminal history alone almost justifies an aggravated term . . . ." The court interjected, "when you say you gave him bad advice, the bad advice was based upon the information he provided you," and Olson said, "That's correct." She then stated that defendant's criminal history left her without "any valid arguments" in response to the tentative sentencing decision.

The court imposed a sentence of 13 years 8 months. As it recited the terms of the sentence, Olson interrupted to say that "my client's indicating, first of all, he's confused as to what I said and trying to incorporate it," and that "he indicated that he'd like to withdraw his plea based on the misunderstanding and my advice to him about being able to argue for a mitigated term." Olson reiterated that, "had I known the extent of his criminal history, I would have advised him to take the stipulated mid term [sentence]," and the court responded, "He knew he had the convictions. You didn't. So I'm not sure what the basis [for withdrawing the plea] would be. . . . [H]e knew he went to prison." The court deemed defendant's request an oral motion to withdraw the plea, denied it, and

finished reciting the sentence. The court entered judgment, and defendant timely appealed.[1]

Discussion

A defendant is entitled to effective assistance of counsel in plea bargaining, and may move to withdraw a plea on the ground that counsel performed ineffectively in advising him to enter it. (*In re Alvernaz* (1992) 2 Cal.4th 924, 933–934.) A defendant making such a motion must offer clear and convincing evidence of good cause to withdraw the plea. (Pen. Code, § 1018; *People v. Wharton* (1991) 53 Cal.3d 522, 585.) We review the denial of such a motion for abuse of discretion. (*Wharton*, at p. 585.)

Defendant argues that the trial court abused its discretion in two ways—by failing to find that Olson had provided ineffective assistance, and by denying his motion to withdraw his plea without conducting an in camera hearing to determine whether he wanted the court to appoint substitute counsel to investigate and present the motion.

The first argument fails because, as the trial court succinctly noted, "the bad advice [Olson gave] was based upon the information [defendant] provided." After recounting defendant's statement "that he did not have any prior prison terms or felonies," Olson added that she "assume[d] now he meant in California." However she never suggested—and defendant has never contended—that his statement was equivocal, or that she had limited her inquiry to prison terms or felonies in California. Defendant asserts that Olson "failed to adequately investigate a significant portion of [his] background before advising him," but it was not incompetence for her to assume that defendant, her client, was not withholding such basic information that he was not likely to forget or to have any reason to conceal.

Defendant's second argument also fails. Citing *People v. Garcia* (1991) 227 Cal.App.3d 1369, disapproved on other ground by *People v. Smith* (1993) 6 Cal.4th 684, he contends that because he made an assertedly "colorable" claim of

[1] The trial court initially declined to issue a certificate of probable cause, but after this court issued an alternative writ of mandate, the trial court granted a certificate.

ineffective assistance, the court was required to appoint new counsel " 'to fully investigate and present the motion.' " (*Garcia,* at p. 1377.) Even were defendant's showing of ineffective assistance colorable, that argument would fail because in *People v. Sanchez* (2011) 53 Cal.4th 80 the California Supreme Court disapproved the approach suggested by *Garcia*.

In *Sanchez* the court held that a trial court must hold a hearing on whether to appoint substitute counsel to investigate and present a motion to withdraw a plea "only when there is 'at least some clear indication by defendant,' either personally or through his current counsel, that defendant 'wants a substitute attorney.' " (*People v. Sanchez, supra,* 53 Cal.4th at pp. 89–90.) Although *Sanchez* did not cite or expressly disapprove *Garcia*, it squarely held that a court need only treat a motion to withdraw a plea based on ineffective assistance as a motion to appoint substitute counsel if the defendant gives " 'some clear indication . . .' . . . that [he] 'wants a substitute attorney.' " (*Id.* at p. 84.) Defendant gave no such indication.

In an attempt to avoid *Sanchez,* Defendant contends that he was "precluded from requesting substitute counsel, since he was never given the opportunity to directly address the court." But no authority imposes a duty of inquiry on the trial court in this situation. To the contrary, the plain language of *Sanchez* places on the defendant the onus of giving " 'some clear indication' " that he or she wants a substitute attorney. (*Sanchez, supra,* 53 Cal.4th at p. 84.) Defendant was present throughout the sentencing hearing and never tried to indicate—personally, or through Olson—that he wanted substitute counsel. The court did not prevent him from doing so, and *Sanchez* thus forecloses his claim.

Finally, defendant contends the trial court abused its discretion by failing to adequately "elicit and consider [his] reasons for believing he ha[d] been ineffectively represented." (*People v. Garcia, supra,* 227 Cal.App.3d at p. 1377.) He does not suggest any relevant facts that such an inquiry would have elicited. He does cite the observation in *People v. Smith, supra,* 6 Cal.4th at page 692 that a lawyer arguing her own past incompetence is subject to a conflict of interest, thus assertedly demanding that the court make such an inquiry. In *Sanchez,* however, the court clarified that, while *Smith* "noted

that 'it is difficult for counsel to argue his or her own incompetence,' . . . we neither suggested it is impossible for counsel to do so nor that a trial court should presume a defendant is requesting substitute counsel without at least some indication that he or she wants to be represented by [new] counsel." (*Sanchez*, *supra*, 53 Cal.4th at p. 89.) Here, Olson made clear to the court the basis on which she herself considered her performance inadequate. Defendant does not suggest there was anything further to be disclosed. The trial court did not abuse its discretion in accepting Olson's account of her conversation with defendant without questioning defendant. Nor did the court abuse its discretion in failing to appoint separate counsel to argue the matter, or in denying the motion to withdraw defendant's guilty plea.

Disposition

The judgment is affirmed. At the parties' mutual request, the superior court clerk is directed to correct the abstract of judgment by (1) changing each entry in the "Enhancements" column from "PC 337.9 (a)(c)(4)" to "PC 667.9 (a)(c)(4)" and (2) changing the "Year Crime Committed" entry for each count from 2017 to 2016.

Pollak, P.J.

We concur:

Tucher, J.
Brown, J.